No. 86-1930

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1986

DAVID GRYNBERG, individually and as delegated Proponent of the Grievance in the Arbitration between LOCAL 1-J, AMALGAMATED JEWELRY, DIAMOND & WATCHCASE WORKERS UNION, S.E.I.U., AFL-CIO, and SKALET, INC., Employer,

Petitioner,

vs.

SKALET, INC. and LOCAL 1-J, AMALGAMATED JEWELRY DIAMOND & WATCHCASE WORKERS UNION, S.E.I.U., ALF-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT SKALET, INC.'S BRIEF IN OPPOSITION

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Respondents.

RESPONDENT SKALET, INC.'S BRIEF IN OPPOSITION

Respondent SKALET, INC.[1] respectfully requests that this Court deny the Petition for Writ of Certiorari[2] seeking review of the Second Circuit Court of Appeals decision because there are no special or important considerations warranting review, as set forth in Rule 17 of the Rules of this Court.

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[1]Skalet, Inc. is a privately held corporation with no parent company, subsidiary or affiliate.

[2]Petitioner, without any apparent authorization, changed the official caption by naming David Grynberg as an individual Petitioner and by converting the Union from a named Petitioner to a named Respondent.

STATEMENT OF THE CASE

SKALET, INC. ("Skalet") is a jewelry manufacturer and a member of the Jewelry Manufacturers Association, Inc. (the "Association"). The Association and its members are bound by a Collective Bargaining Agreement (the "Agreement") between the Association and the Amalgamated Jewelry, Diamond & Watchcase Workers' Union Local No. 1-J Service Employees International Union, AFL-CIO (the "Union"), which contains a grievance settlement procedure providing for arbitration (J.A. p. 65a).[3]

Petitioner, a Union member, was employed as a production jeweler since January 11, 1977 in Skalet's Jewelry Department. On March 12, 1984, the Union filed a demand for arbitration alleging that Petitioner was improperly laid off in contravention of the seniority provisions of the Agreement.

Prior to and during the course of preparing for the arbitration hearing, a dispute arose between Petitioner and the Union over how Petitioner's case before the Arbitrator should be handled and what witnesses should be called (A. pp. 14a-15a).

At the initial arbitration hearing on August 7, 1984, the Union and its counsel requested that the Arbitrator grant them permission to withdraw as Petitioner's representatives in the arbitration. Petitioner was given the opportunity by the Arbitrator to respond to the Union's request. After considering Petitioner's response and his letter to the Union dated August 3, 1984 (J.A. pp.

[3]For ease of reference, Petitioner's separate appendix annexed to his petition is referred to as "A", and the joint appendix submitted and referred to by Petitioner is referred to as "J.A."

the Arbitrator found that "the Union and its counsel do not have Mr. Grynberg's trust and faith adequately to represent him." The Arbitrator noted further:

> The Union and its counsel . . . are put to the task of performing their functions under the stressful cloud of Mr. Grynberg's expressed lack of confidence in them, a situation that invites repetition and escalation of Mr. Grynberg's complaint and subjects the Union and counsel to untenable compromise should they fail in their efforts to represent him (A. pp. 17a-18a).

The motion of the Union was granted. Petitioner was directed to obtain other legal representation. The Union and its counsel were relieved from active participation in the arbitration proceeding and were directed to supply data, documentation and administrative assistance to Petitioner and his attorney. Petitioner obtained other counsel and the Union and its counsel fully cooperated with Petitioner's counsel throughout the proceeding. Both the Union's counsel and Petitioner's counsel attended each of the three subsequent hearings held on January 23, 1985, March 15, 1985 and August 27, 1985.

The Arbitrator denied the grievance, finding that Petitioner had not been laid off in violation of the Collective Bargaining Agreement (J.A. pp. 23a-27a).

By letter dated November 29, 1985, Petitioner's counsel requested that the Union join in his application to set aside the Arbitrator's Award. The Union, while indicating that it disagreed with the Arbitrator's decision, declined to do so and instructed Petitioner that under no circumstances was he to indicate in his application that he represents the Union (J.A. pp. 54a-55a).

Petitioner commenced this proceeding pursuant to 9 U.S.C. Section 10(d) in the Union's name seeking to

vacate the Arbitrator's Award, alleging that the Arbitrator exceeded his powers in the award made on August 20, 1984 which allowed the Union and its counsel to withdraw, and in the award of November 9, 1985 which denied the grievance (J.A., pp. 6a-61a). During the course of the proceeding, Petitioner shifted his emphasis from simple vacatur of the Arbitration Award to a direct action against Respondent Skalet pursuant to §301 of the Labor Management Relations Act ("LMRA").

Petitioner has not filed an unfair labor practice complaint against the Union, nor has he instituted suit against the Union for any claimed breach of its duty of fair representation.[4]

ARGUMENT

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. THE COURT'S PRIOR DECISION IN *HINES V. ANCHOR MOTOR FREIGHT, INC.* IS CONTROLLING

Petitioner attempts to portray this case as one of monumental importance to millions of workers and of great precedential significance. In fact, the case is unique in its facts, and is of minor precedential significance if any, since it was not reported in an official reporter except for a sub modo notation of affirmance by the Circuit Court, and correctly applies this Court's holding in *Hines vs. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

[4]Respondent Skalet, Inc. will not address Petitioner's charges relating to the Union's conduct subsequent to the District Court's decision except to note that said conduct could not have affected the Arbitrator's decision and to confess incredulity as to how Petitioner could covert the Union from the "named petitioner" at the District Court level to a "named respondent" before this Court.

The essence of Petitioner's claim is that the withdrawal by the Union and its counsel from directly representing Petitioner at the arbitration hearing constituted a breach of the Union's duty of fair representation which ipso facto tainted the Arbitrator's award, allowing him to avoid the finality of the arbitrator's decision by maintaining a §301 suit against the employer.

In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), this Court held that the finality of an arbitrator's award prevents an employee from maintaining a §301 suit against his employer, unless the employee can show that his Union breached its duty of fair representation and that there is substantial reason to believe that such breach contributed to an erroneous arbitration award. The Court stated:

> The union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the Contract. . . . It is also true that where the union actually utilizes the grievance and arbitration procedures on behalf of the employee, the focus is no longer on the reasons for the union's failure to act, but on whether contrary to the arbitrator's decision, the employer breached the Contract and whether there is substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings. *Id.* at 567, 568.

Apart from the fact that the District and Circuit Courts both held that the Union's conduct did not constitute a breach of its duty of fair representation (A., pp. 11a and 2a), Petitioner made no effort to plead or demonstrate that the Union's conduct contributed to the alleged erroneous outcome of the arbitration proceeding.

Petitioenr claimed that the Union's conduct constituted an intrinsic infirmity in the arbitral process entitling him to proceed against the employer under §301, without the necessity of showing a tainting of the arbitrator's award (Petitioner's brief p. 19).

The District Court, applying *Hines, supra,* held that even if the Union did breach its duty, the Petitioner failed to either plead or establish in his papers that there is substantial reason to believe that the Union's breach of duty contributed to the allegedly erroneous outcome of the arbitration proceeding. Neither the Circuit Court or the District Court addressed the question of whether the Arbitrator exceeded his powers in interpreting the seniority provision of the Agreement so as to permit Respondent, who had no more than two (2) hours work per day in Petitioner's job classification, to retain a junior employee to perform work outside Petitioner's job classification, as that issue was not before the Court on Respondent's motion to dismiss.

Petitioner misinterprets the import of the rulings of the District Court and Circuit Court, and thus interposes questions to this Court not reached by the lower Courts. The District Court and Circuit Court merely held that based upon the unique circumstances of this case, the Union did not breach its duty of fair representation. They did not, as Petitioner suggests, hold that a Union is immune from liability for withdrawing without just cause from representation of an employee (Petitioner's brief P. 9). Such an interpretation is particularly unwarranted in light of Petitioner's unexplained failure to attempt to hold the Union accountable for its actions by instituting an action or unfair labor practice complaint against it (A. p. 12a).

Nor is this area of the law in further need of this Court's authoritative voice. In *Del Casal v. Eastern Airlines Inc.*, 634 F.2d 295 (5th Cir. 1981) cert. den. 454 U.S. 892 (1981), a union requested a hearing on behalf of a non-union employee before the Pilots Systems Board of Adjustment and thereafter refused to allow its attorney to represent the employee. The employee retained his own counsel who represented him throughout the hearings. The employee, inter alia,[1] alleged that the arbitral proceeding was seriously undermined by the Union's failure to represent him. The District Court held that the Union breached its duty of fair representation by withholding representation on the basis of union membership, but nevertheless dismissed the action against the innocent employer. Applying the *Hines* doctrine, the Fifth Circuit Court affirmed, holding that the Union's breach of its fiduciary duty did not seriously undermine the integrity of the arbitration proceeding, and that the employee's assertions to the contrary were invalid conjecture.

Similarly, in *Wood v. International Brotherhood of Teamsters*, 807 F.2d 493 (6th Cir. 1986) cert. den. 6/22/87 (Docket No. 86-1759), Union employees were represented by independent counsel throughout arbitral proceedings and thereafter brought a §301 action against the Employer and the Union. The Employer unsuccessfully moved for summary judgment on the basis of the finality clause in the Collective Bargaining Agreement. The case proceeded to trial, at which an expert witness testified that an arbitrator might be influenced by signals given out by a

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[1]The employee also unsuccessfully attempted to vacate the arbitration proceeding based upon Railway Labor Act §153(9), which authorized an *employee* to petition to the District Court to review an award.

Union indicating that the Union did not want to win the case. The jury returned a verdict against the Union and Employer, which the District Court upheld despite the Employer's motion for judgment notwithstanding the verdict. In reversing the District Court's denial of the employer's motion for judgment as a matter of law, the Sixth Circuit Court, citing *Hines*, held that:

> [T]here was no evidence from which the jury could find that there was a substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings assuming that the outcome was erroneous. . . . Plaintiff's independent attorneys insured that plaintiff's interests were fairly represented. Any breach by the Union of its duty of fair representation therefore could not have tainted the decision of the arbitrator. . . . Expert testimony that some arbitrators may be influenced by Union signaling does not permit the speculation that this arbitration was so influenced where plaintiffs' own attorney fully presented their case. *Id.* at 501.

In the instant case, the Petitioner failed to plead or establish a substantial reason to believe that the Union's alleged breach of its duty contributed to the alleged erroneous outcome of the arbitration proceeding (A. p. 12a). The District Court and Circuit Court therefore correctly interpreted and applied this Court's holding in *Hines*.

II. THE ARBITRATOR ACTED WITHIN HIS POWERS BY RELIEVING THE UNION AND ITS COUNSEL OF ITS DUTY TO ACTIVELY PARTICIPATE IN THE ARBITRATION HEARING.

The manner in which an Arbitration Hearing proceeds is a procedural matter within the jurisdiction of the arbitrator.

> Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator. *John Wiley & Sons v. Livingston,* 376 U.S. 547, 557 (1964).

Necessarily, a wide range of discretion must be afforded to an arbitrator in resolving procedural issues which arise before him, or the system of arbitration would become ungovernable. The Arbitrator carefully considered the Petitioner's pre-hearing conduct, as well as the content of his letter of August 3, 1984. Petitioner's responses to questions propounded by the Arbitrator further confirmed that the Union and its counsel lacked Petitioner's trust and faith.

So long as the arbitrator acts within his powers it is not within the province of the Federal courts to question the Arbitrator's resolution of a procedural issue in the absence of clear and overwhelming evidence of prejudicial misconduct. Here, there was no evidence of any misconduct by the Arbitrator. To the contrary, Petitioner acknowledged the Arbitrator's good faith in his attorney's letter of January 14, 1985 (J.A., p. 34a). The Arbitrator here clearly acted within his powers by directing Petitioner to retain counsel to his liking and trust.

III. PETITIONER LACKS STANDING UNDER THE FEDERAL ARBITRATION ACT TO MOVE TO VACATE AN UNFAVORABLE ARBITRATION AWARD.

Petitioner initially petitioned the District Court to vacate the Arbitrator's Award pursuant to §10(d) of the Federal Arbitration Act (9 U.S.C. §10(d)) on the ground that the Arbitrator exceeded his powers. §10 authorizes a

District Court to vacate an Arbitration Award upon the application of any *party* to the arbitration. Non-parties to the Collective Bargaining Agreement pursuant to which an arbitration is brought lack standing to institute a proceeding under §10 to vacate the award. *Dundas Shipping & Trading Co. Ltd. v. Stravelakis Bros., Ltd.*, 508 F.Supp. 1000 (S.D.N.Y. 1981; *United States Postal Service v. American Postal Workers' Union*, 564 F.Supp. 545 (S.D.N.Y. 1982); *Lofton v. United States Postal Service*, 596 F. Supp. 36 (S.D.N.Y. 1984).

Since the Union and not the Petitioner, was a party to the Collective Bargaining Agreement, Petitioner lacks standing to institute a proceeding under §10 of the Federal Arbitration Act.

The Union's request to be relieved as Petitioner's representative and the Arbitrator's Award granting that request related only to the hearings then being conducted before the Arbitrator. There is nothing to indicate that the Union intended to be relieved, or, that the Arbitrator relieved the Union of any post-hearing obligations. The Arbitrator relieved the Union and counsel from active participationg in the hearings but nevertheless directed the Union and its counsel to provide the Petitioner with documentation and assistance (A. p. 18a). He did not substitute the Petitioner as a party to the proceeding, nor did he authorize the Petitioner to pursue any legal remedy. Nor could the Arbitrator have authorized Petitioner to move to confirm or vacate his award since Paragraphs 44.3 and 44.4 of the Collective Bargaining Agreement state:

> 44.3 It is agreed that this Contract shall not create or vest in any employee or group of employees, any rights or remedies which they or any of them can enforce either at

> law, equity or otherwise, as principal or third party beneficiary, it being understood and agreed by the parties hereto that all the rights and privileges created or implied under this Agreement shall be enforceable by the parties hereto and only in the manner established under this Agreement.
>
> 44.4 Except as otherwise provided by law, it is further agreed that no individual employee shall have the right to initiate any arbitration proceeding or any action at law or in equity, under this Agreement, it being the intent of the parties that the right to resolve any issue which may arise between the parties may be exercised only by the parties.

Nor was the Union indifferent to or supportive of Petitioner's motion to vacate the Arbitrator's Award. To the contrary, the Union's counsel informed Petitioner that the Union elected not to seek to set aside the Award and instructed Petitioner that he had no authority to pursue this claim as a representative of the Union (J.A. pp. 54a-55a). That letter clearly demonstrates that no irrevocable litigating commission was intended or granted to Petitioner. Petitioner therefore lacks standing to institute a proceeding under the Federal Arbitration Act. Furthermore, Petitioner's request for an arbitration de novo ignores the fact that the Collective Bargaining Agreement does not compel Respondent to arbitrate disputes with Petitioner in his individual capacity. Reversing the District Court's holding that an individual employee lacks standing to move pursuant to 9 USC §10 to vacate an unfavorable arbitration award would upset the expectations of all employers and unions in selecting arbitration as a means of resolving labor disputes and would lead this court down a slippery road of having to demarcate the actions a disgruntled employee may take in the union's name. For example, Article 6.1 of the Agreement authorizes the union to call a strike if the Employer fails to

comply with an arbitration award. Would Petitioner be authorized to call a strike of all employees if the Respondent failed to comply with the arbitrator's award? Clearly the facts of this case do not warrant this Court's consideration of those issues.

CONCLUSION

Petitioner lacks standing to move to vacate an unfavorable Arbitration Award under the Federal Arbitration Act. Petitioner failed to prove that the Union breached its duty of fair representation and that there was a substantial reason to believe that the Union's breach of duty contributed to the erroneous outcome of the arbitration proceeding, two necessary preconditions to maintain his §301 action. The District Court, as affirmed by the Second Circuit Court, correctly dismissed the Petition.

There is no conflict with any other Circuit Court, no important questions of Federal law to be settled by this Court, and no conflict with applicable decisions of this Court. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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EXCERPTS FROM COLLECTIVE BARGAINING AGREEMENT BETWEEN JEWELRY MANUFACTURERS ASSOC., INC. AND THE AMALGAMATED JEWELRY, DIAMOND & WATCHCSE WORKERS' UNION LOCAL No. 1-J SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO.

ARTICLE XLIV
ALTERATION AND RIGHTS UNDER AGREEMENT

44.1—No agreement, alteration, understanding, variation, waiver or modification of any of the terms or conditions or covenants contained herein shall be made by any employee or group of employees with the Employer or the Association, and in no case shall it be binding upon the parties hereto unless such agreement is made and executed in writing between the parties hereto.

44.2—The waiver of any breach or condition of this Agreement by any party shall not constitute a precedent in the future enforcement of all terms and conditions herein.

44.3—It is agreed that this contract shall not create or vest in any employee or group of employees, any rights or remedies which they or any of them can enforce either at law, equity or otherwise, as principal or third party beneficiary, it being understood and agreed by the parties hereto that all the rights and privileges created or implied under this Agreement shall be enforceable by the parties hereto and only in the manner established under this Agreement.

44.4—Except as otherwise provided by law, it is further agreed that no individual employee shall have the right to initiate any arbitration proceeding or any action at law or in equity, under this Agreement, it being the intent of the parties that the right to resolve any issue which may arise between the parties may be exercised only by the parties.

ARTICLE VI
NO STRIKES OR LOCK-OUTS

6.1—The Union will not call or sanction any strikes or stoppage of any kind whatsoever during the term of this Agreement, except for the Employer's failure to comply with any arbitration award rendered hereunder within five (5) working days after notice of such award.

6.2—The Employers will not cause any lock-outs during the term of this Agreement except for the Union's failure to comply with any arbitration award rendered within five (5) working days after notice of such award.